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No. 03-249

IN THE SUPREME COURT FOR THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

COMES NOW respondent, GARY BRADLEY, by and through counsel, and requests leave to file the attached Respondent's Brief in Opposition and to proceed *in forma pauperis*.

Respondent is indigent. The undersigned counsel was appointed to represent respondent by the Court of Appeal for the State of California, Second Appellate District in his state appeal, the proceeding underlying the matter at bar. The undersigned counsel also was appointed to represent respondent by the United States Court of Appeals for the Ninth Circuit on February 10, 2003, *nunc pro tunc* to February 2, 2001, pursuant to the Criminal Justice Act of 1964, Title 18 United States Code, section 3006A(b).

No affidavit is attached, inasmuch as counsel is exempt therefrom pursuant to Title 18 United States Code, section 3006A(d)(7).

I declare under penalty of perjury the above stated matters are true and correct.

Dated: September 10, 2003

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RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 5

I. As an equitable matter, review by this Court should be precluded because the District Attorney for the County of Los Angeles elected to allow Bradley's release from prison rather than subject him to a new trial. 5

II. Certiorari is not warranted because the Ninth Circuit's holding does not conflict with decisions of this Court, and was based on a unique set of facts that are extremely unlikely to recur. 6

A. *Because the state trial court's refusal to instruct on entrapment, under the circumstances, cannot be considered a "mere error of state law," the Ninth Circuit's treatment of that error is in accord with decisions of this Court.* 6

B. *Whereas the scope of the Court of Appeals' opinion is limited to the facts before it, it does not conflict with decisions of other Circuit Courts of Appeals.* 11

TABLE OF CONTENTS (continued)

Page

III. The Court of Appeals' two incidental references to juror affidavits in discussing the prejudice aspect of the case at bar do not constitute a "holding" requiring correction by this Court, as several other decisions both by this Court and the Ninth Circuit squarely address this issue. 16

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Pages

Cases

Abatino v. United States, 750 F.2d 1442 (9th Cir. 1985) 17

Baker v. Leapley, 965 F.2d 657 (8th Cir. 1992) 14

Barker v. Yukins, 199 F.3d 867 (6th Cir. 1999) 15

California v. Trombetta, 467 U.S. 479 (1984) 6,7

Clemmons v. Delo, 177 F.3d 680 (8th Cir. 1999) 7,14,15

Cupp v. Naughten, 414 U.S. 141 (1973) 8,9,14,15

Davis v. Strack, 270 F.3d 111 (2d Cir. 2001) 15

Delli Paoli v. United States, 352 U.S. 232 (1957) 10

Ellis v. Hargett, 302 F.3d 1182 (10th Cir. 2002) 13

Estelle v. McGuire, 502 U.S. 62 (1991) 8,9,12,14,15

Fulwood v. Lee, 290 F.3d 663 (4th Cir. 2002) 18,19

Gilmore v. Taylor, 508 U.S. 333 (1993) 8,13

Hard v. Burlington Northern R.R. Co., 870 F.2d 1454 (9th Cir. 1989) 17

Johnson v. Rosemeyer, 117 F.3d 104 (3d Cir. 1997) 12

Mathews v. United States, 485 U.S. 58 (1988) 6,10

McDowell v. Calderon, 107 F.3d 1351 (9th Cir. 1997) 17

Murphy v. Tivoli Enterprises, 953 F.2d 354 (8th Cir. 1992) 17

TABLE OF CITED AUTHORITIES (continued)

	Pages
Oklahoma City v. Tuttle, 471 U.S. 808 (1985)	5
People v. Box, 23 Cal.4th 1153 (2000)	10,11
People v. Davis, 10 Cal.4th 463 (1995)	10
People v. Johnson, 30 Cal.4th 1302 (2003)	11
People v. McLain, 46 Cal.3d 97 (1988)	10
People v. Reliford, 28 Cal.4th 647 (2002)	2
Sherman v. United States, 356 U.S. 369 (1958)	10
Silagy v. Peters, 905 F.2d 1086 (7th Cir. 1990)	17
Sloan v. Gramley, 215 F.3d 1330 (7th Cir. 2000)	14
Smith v. Horn, 120 F.3d 400 (3d Cir. 1997)	12,13
Sparf & Hanson v. United States, 156 U.S. 51 (1895)	10
Spencer v. Kenma, 523 U.S. 1 (1998)	5
Tanner v. United States, 483 U.S. 107 (1987)	17
Taylor v. Louisiana, 419 U.S. 522 (1975)	10
Taylor v. Withrow, 288 F.3d 846 (6th Cir. 2002)	7,14
Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995)	14
United States v. Bagnol, 665 F.2d 877 (9th Cir. 1981)	17

TABLE OF CITED AUTHORITIES (continued)

Pages

United States v. Cappas, 29 F.3d 1187 (7th Cir. 1994) 17

United States v. Falsia, 724 F.3d 1339 (9th Cir. 1983) 17

United States v. Gaudin, 515 U.S. 506 (1995) 10

United States v. Labrada Gurolla, 333 F.3d 944 (9th Cir. 2003) 11

United States v. Sharpe, 470 U.S. 675 (1985) 6

United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 6

Wade v. Terhune, 202 F.3d 1190 (9th Cir. 2000) 10

Williams v. Taylor, 529 U.S. 362 (2002) 7

Wood v. Marshall, 790 F.2d 548 (6th Cir. 1986) 13

Constitutional Authority

U.S. Constitution, Article III, Section 2 5

U.S. Constitution, Fifth Amendment 3,14

U.S. Constitution, Sixth Amendment 14

U.S. Constitution, Fourteenth Amendment 7,13

Statutes

28 U.S.C. § 2254(d) 10

TABLE OF CITED AUTHORITIES (continued)

Pages

Other Authority

California Jury Instructions, Criminal (CALJIC) No. 4.61 2

Rule 606(b), Federal Rules of Evidence 17,18

Shepard's Citations Online 11

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IN THE SUPREME COURT FOR THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Gary Bradley, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case, reported as *Bradley v. Duncan*, 315 F.3d 1091 (9th Cir. 2002).

JURISDICTION

Respondent respectfully requests that this Court determine the case at bar is moot, insofar as the District Attorney for the County of Los Angeles, representing the People of the State of California, elected not to retry respondent within 60 days after the mandate issued and instead allowed that period to lapse, thereby facilitating respondent's release from prison. As an equitable matter, petitioner, also representing the People of the State of California, should be precluded from now seeking to reinstate respondent's judgment of conviction and sentence.

STATEMENT OF THE CASE

In early 1996, two undercover police officers enlisted Flores, who was exhibiting obvious symptoms of drug withdrawal, as an unwitting decoy to assist them in purchasing illicit drugs. Flores detained Bradley, who was riding his bicycle home from work, and vomited in front of him. Flores beseeched Bradley to help him obtain some drugs because he was withdrawing and gave him the $20 bill previously provided by the police. Bradley responded that he did not use drugs, but eventually managed to locate a street dealer and obtain a piece of cocaine weighing 0.17 grams for Flores. Bradley received no money or drugs for his services. He was about to continue his bicycle ride home when he was arrested.

At Bradley's trial in the California superior court, the undercover police officers described Flores's physical condition and actions. Bradley testified on his own behalf that he obtained the drugs for Flores out of sympathy for an obviously sick and desperate man. The court instructed the jury on entrapment, and after several days of deliberation and multiple requests for clarification on entrapment, the jury declared itself unable to reach a unanimous verdict.[1] The court declared a mistrial.

Bradley was tried on the same charge before a different judge. During his

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1. Under California law, entrapment occurs if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the criminal act other than ordinary criminal intent, including friendship or sympathy, rather than a desire for personal gain or other typical criminal purpose. California Jury Instructions, Criminal (CALJIC), No. 4.61. See Pet., App. A at A16. Petitioner cites for this proposition *People v. Reliford*, 28 Cal.4th 647 (2002). Pet. at 4. This citation is in error, and respondent is unaware of any case under this caption involving entrapment.

second trial, the prosecution introduced evidence virtually identical to the first trial. Defense counsel objected to the introduction of Bradley's testimony from his first trial as a violation of his Fifth Amendment right not to testify. See Appendix A.[2] The court overruled the objection and permitted Bradley's testimony -- in which he admitted every element of the offense charged -- to be read into the record. The court later, without any explanation, denied Bradley's request for entrapment instructions. See Appendix B. Bradley was convicted and sentenced to 25 years to life in prison, pursuant to California's Three Strikes laws.

After the California Court of Appeal affirmed Bradley's conviction, the California Supreme Court denied discretionary review.[3]

Bradley thereafter filed a petition for writ of habeas corpus in the United States District Court. The District Court adopted the federal magistrate's findings that the state trial court's refusal to instruct the jury on entrapment deprived Bradley of his right to due process of law. The District Court vacated Bradley's conviction and conditionally granted his petition for writ of habeas corpus, directing the State of California to retry Bradley within 60 days or release him from custody.

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2. In her dissent to the Court of Appeals' opinion, Judge Graber misstates the facts by claiming trial counsel "allowed" Bradley's testimony from the first trial to be read into the record. Pet., App. A. at A27.

3. After he filed his Appellant's Opening Brief in the state Court of Appeal, Bradley moved to amend his opening brief to include the argument that the trial court's actions denied his federal right to due process. The Court of Appeal denied Bradley's motion to amend. Bradley again raised a federal due process argument in a petition for rehearing to the Court of Appeal, which the court denied, and similarly raised that argument in his petition for review to the California Supreme Court.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's order granting habeas relief, finding the state appellate court's decision was an objectively unreasonable application of federal law, and also involved an unreasonable determination of the facts in light of the evidence presented.

The Court of Appeals denied petitioner's petition for rehearing and for hearing en banc and timely issued its mandate, thereby triggering the 60-day period within which to retry Bradley. Petitioner thereafter moved to recall and stay the mandate. The Court of Appeals denied petitioner's motion.

The District Attorney for the County of Los Angeles elected not to retry Bradley and instead allowed the 60-day period to lapse. The state therefore released Bradley from custody on August 4, 2003.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

As an equitable matter, review by this Court should be precluded because the District Attorney for the County of Los Angeles elected to allow Bradley's release from prison rather than subject him to a new trial.

A case becomes moot when it no longer satisfies the "case or controversy" requirement of Article III, Section 2 of the Constitution. See *Spencer v. Kenma*, 523 U.S. 1, 7 (1998). In the case at bar, the mandate issued and was spread in the District Court on June 5, 2003. The District Attorney for the County of Los Angeles, representing the People of the State of California, thereafter decided not to return Bradley to Los Angeles County for a new trial, reportedly because it was felt Bradley has served sufficient time in custody -- over seven and one-half years -- for his conduct.[4] The state therefore released Bradley from prison without obtaining or attempting to obtain a new conviction.

This executive decision having been made by a party representing the People of the State of California, there is no compelling reason for this Court to expend "scarce judicial resources," *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), on a matter which, in essence, already has been decided as a matter of policy.

Admittedly, a decision by this Court reversing the Ninth Circuit Court of Appeals could reinstate Bradley's original judgment of conviction and sentence. See

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4. As a matter of policy, Steve Cooley, the District Attorney for Los Angeles County popularly elected after Bradley was convicted, generally does not prosecute minor drug crimes as Three Strikes cases.

United States v. Villamonte-Marquez, 462 U.S. 579, 581, fn.2 (1983); *United States v. Sharpe*, 470 U.S. 675, 681, fn. 2 (1985). Here, however, the state evidently was content to allow Bradley to avoid a further conviction and incarceration.[5] Petitioner's subsequent attempt to undermine the policy determination of the local District Attorney's Office does not warrant this Court's attention. Based on principles of equity, this matter should not qualify as a continuing case or controversy.

II.

Certiorari is not warranted because the Ninth Circuit's holding does not conflict with decisions of this Court, and was based on a unique set of facts that are extremely unlikely to recur.

A. *Because the state trial court's refusal to instruct on entrapment, under the circumstances, cannot be considered a "mere error of state law," the Ninth Circuit's treatment of that error is in accord with decisions of this Court.*

In its opinion, the Ninth Circuit dutifully acknowledged this Court's precedents. In *Mathews v. United States*, 485 U.S. 58, 63 (1988), this Court held that, "[a]s a general proposition, a defendant is entitled to an instruction for which there exists evidence sufficient for a reasonable jury to find in his favor." In *California v. Trombetta*, 467 U.S. 479 (1984), this Court held

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5. Thus, this matter is distinguishable from *Sharpe*, *supra*, 470 U.S. at 681, fn. 2, where the Court found the case was not moot because the respondents had become fugitives after the Court granted certiorari. Here, by contrast, one state representative affirmatively decided not to retry Bradley before another state representative sought certiorari in this Court.

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a *meaningful* opportunity to present a complete defense.

Id. at 485 (emphasis added). The Court of Appeals also correctly observed that this Court's precedents encompass the legal principles flowing from those precedents. Pet., App. A at A15, citing *Williams v. Taylor*, 529 U.S. 362, 407 (2002); see also *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002), *cert. denied*, __ U.S. __, 123 S.Ct. 490, 154 L.Ed2. 406 (2002).

Petitioner myopically characterizes Bradley's claim as addressing a "mere error of state law." Pet. at 6, 7, 8, 11. The federal due process violation here did not arise because the state court gave a jury instruction that was faulty under state law. This was not a case where, for example, "the contours of the defense, under [state] law, were not explained properly." *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999). To the contrary, the first trial court, finding adequate evidence to warrant such an instruction under state law, correctly instructed the jury on entrapment. The jury could not arrive at a unanimous verdict, despite several days of deliberation and multiple requests for clarification. On retrial before a different judge, the court refused to instruct on entrapment, but allowed the prosecution to introduce Bradley's testimony from the first trial, over defense objection. As the Ninth Circuit observed, quoting the District Court:

> By refusing to instruct the jury on entrapment, the trial judge essentially left the jury with [Bradley's] confession to the offense, without ever allowing them to consider [Bradley's] preclusive defense. By rejecting [Bradley's] request for an entrapment instruction, the trial court effectively deprived [Bradley] of his only defense.

Pet., App. A at A9.

It was upon this unique set of facts that the Ninth Circuit found a due process violation. Pet., App. A at A11-A12 ["*Under these circumstances*, the failure to instruct on entrapment prevented Bradley from presenting his full defense. Accordingly, due process was violated." (Emphasis added.)]. Petitioner overinflates the Ninth Circuit's decision as broadly "holding[] that the federal Constitution guarantees instructions on state-law affirmative defenses, ..." Pet. at 6. The Court of Appeals nowhere approached such an expansive holding. Nor did the Ninth Circuit hold as a general proposition, as petitioner claims, that "the Constitution requires jury instructions on state-law affirmative defenses that embrace facts beyond the elements of the charged crime." Pet. at 9. This, simply, is hyperbole.

The Ninth Circuit does not run afoul of this Court's "rule reaffirmed in *Estelle v. McGuire*[, 502 U.S. 62 (1991)] that instructional errors of state law *generally* may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993) (emphasis added). As Justice O'Connor cautioned in *Taylor*:

> Although the Court's opinion today might be read as implying that erroneous jury instructions may never give rise to constitutional error outside of capital cases [citation], such an implication would misconstrue our precedent. When the Court states that "instructions that contain errors of state law may not form the basis for federal habeas relief" [citation], it must mean that a *mere* error of state law, one that does not rise to the level of constitutional violation, may not be corrected on federal habeas. Some erroneous state-law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case.

Id., 508 U.S. at 348-349 (O'Connor, J., concurring) (emphasis added). Justice O'Connor's concurrence comports with the holding of *Cupp v. Naughten*, 414 U.S.

141, 147 (1973), in which this Court ruled that for a petitioner to obtain relief based on a faulty jury instruction, the instruction "must so infect the entire trial that the resulting conviction violates due process."

Notably, *Estelle v. McGuire* does not hold that errors of state law may *never* provide the basis for habeas relief. Rather, *McGuire* allows that some ailing instructions by themselves might so infect the entire trial that the resulting conviction violates due process. *Id.*, 502 U.S. at 72, citing *Naughten*, 414 U.S. at 147. *McGuire* simply held that neither the admission of the challenged evidence in that case, nor the jury instruction used -- which only arguably misstated California law -- so infused the trial with unfairness as to deny due process of law. *Id.* at 75. In the case at bar, by contrast, the contrary rulings in the state courts below -- first instructing on entrapment, and later, after Bradley effectively confessed to the jury the elements of the crime, refusing to instruct on the only available defense to explain that confession -- "so infect[ed]" the procedures as to violate Bradley's federal due process. *Naughten*, 414 U.S. at 147; *McGuire*, 502 U.S. at 72. Petitioner's mantra that Bradley raised only a claim of "mere" state error seeks to obscure the unique factual circumstances that elevate this case to the realm of federal constitutional error.

Moreover, the Ninth Circuit was correct in rejecting the California Court of Appeal's legal conclusion that the evidence at Bradley's trial did not warrant instruction on entrapment. Pet. at 7-8. Clearly, at least one juror in Bradley's first trial believed he had been entrapped, *as defined under state law*. For the California Court of Appeal to have concluded otherwise, as a matter of law, the court had to presuppose that juror was *not* "reasonable." Yet the very foundation of American

jurisprudence rests on the belief that juries are comprised of "reasonable" people who follow the law as instructed.[6] See *Mathews*, *supra*, 485 U.S. at 63. As this Court long ago observed, "[T]he issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Sherman v. United States*, 356 U.S. 369, 377 (1958). The California Court of Appeal's conclusion that there was insufficient evidence of entrapment as a matter of California law usurped the function of the jury as fact-finders, and undermines the deference that courts must accord juries. Under the facts presented in this case, the California Court of Appeal's conclusion *was* "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Ninth Circuit was correct in granting habeas corpus relief on this basis.

Nor is certiorari warranted in this case in order to rectify the so-called "mischief" purportedly created in state courts by past Ninth Circuit decisions not at issue here and involving unrelated matters. Pet. at 8.[7]

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6. It has long been established that juries are expected to follow the law as given by the courts. *Sparf & Hanson v. United States*, 156 U.S. 51, 102 (1895); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *United States v. Gaudin*, 515 U.S. 506, 513 (1995). Thus, in both federal and California courts, the jury is presumed to have followed the instructions given by the court. *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957); *People v. McLain*, 46 Cal.3d 97, 119-120 (1988); *People v. Davis*, 10 Cal.4th 463, 542 (1995).

7. In any event, petitioner exaggerates the extent of the "mischief." In *People v. Box*, 23 Cal.4th 1153, 1188, fn. 7 (2000), for example, the California Supreme Court noted *Wade v. Terhune*, 202 F.3d 1190 (9th Cir. 2000) referred to a "raised an inference" standard of examining a party's claim that a peremptory jury challenge was unconstitutional, whereas in California courts a party must raise a

(continued...)

Finally, petitioner's fear that unless reviewed, the Ninth Circuit's opinion will effectively open the flood-gates to "numerous similar challenges based on alleged state-law errors," pet. at 9, is unfounded. According to *Shepard's Citations Online* subsequent history service, in the approximately nine months since *Bradley* was published, exactly one citeable case has referred to that decision, and for the unremarkable proposition that harmless error analysis applies to a trial judge's failure to instruct the jury on entrapment. *United States v. Labrada Gurolla*, 333 F.3d 944, 957 (9th Cir. 2003) ["We need not decide whether these facts, and the attendant legal theory of inducement by trickery, entitled Labrada to an entrapment instruction, because it is clear that Labrada suffered no harm by the district court's refusal to give that instruction. See *Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) ....]" Because the Ninth Circuit's opinion so clearly was predicated on a set of facts unique to this case, the decision has negligible precedential value.

B. *Whereas the scope of the Court of Appeals' opinion is limited to the facts before it, it does not conflict with decisions of other Circuit Courts of Appeals.*

1. The Ninth Circuit's opinion below simply held that, under these particular circumstances, the state trial court denied Bradley's federal due process right. Petitioner asserts the Ninth Circuit's opinion conflicts with law in other Circuits, pet.

(...continued)
"strong likelihood" the challenge had an impermissible basis. However, *Box* agreed with the Ninth Circuit that in California a "strong likelihood" means a "reasonable inference." This corollary recently was reaffirmed by the California Supreme Court in *People v. Johnson*, 30 Cal.4th 1302, 1312-1314 (2003).

at 13, yet also acknowledges that in several other Circuits "opinions on this issue go both ways," pet. at 14, thereby implicitly recognizing that the Court of Appeals' decision here at least comports with *some* other federal appellate decisions left untouched by this Court.

Petitioner largely rests his claim of conflicting appellate authority on the holding of *Johnson v. Rosemeyer*, 117 F.3d 104 (3d Cir. 1997). Pet. at 13. *Johnson* cited *McGuire*'s holding that it is not the province of a federal habeas corpus court to re-examine state court determinations on state law questions, yet recognized, under *McGuire*, that federal courts still retain supervisory authority over state judicial proceedings and may intervene to correct wrongs of constitutional dimension. *Johnson*, 117. F.3d at 109. Later that year, in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), *cert. denied sub nom District Attorney of Bucks County v. Smith*, 522 U.S. 1109, 140 L.Ed.2d 103, 118 S.Ct. 1037 (1998), the Third Circuit explained its holding in *Johnson*:

> ... *Johnson* stands for the unremarkable proposition that the states are free to define criminal offenses in any way they see fit, within certain constitutional limitations, even through their lower courts. This is so even if the definition they choose makes it somewhat easier to convict a person of the offense than would be the case under a different definition. *Johnson* most emphatically does not stand for the proposition that, once a state has defined a criminal offense, the state may then proceed to convict a person of that offense on anything less than proof beyond a reasonable doubt of all the elements of the offense. Thus, whether a state is relieved of that burden via an instruction that omits an element of that offense, materially misdescribes that element, or shifts to the defendant the burden of proof on that element, the result is the same -- the defendant has been denied his federal constitutional rights.

Id. at 415. *Smith* also observed that when the misapplication of state law by a state

court has the effect of depriving a person of life, liberty, or property without due process of law in violation of the Fourteenth Amendment, the resulting federal constitutional error can be corrected by a federal habeas court. *Id.*, 120 F.3d at 414, citing *Gilmore v. Taylor*, *supra*, 508 U.S. at 348-349 (O'Connor, J., concurring.) Thus, "once the state has defined the elements of an offense, the federal Constitution imposes constraints upon the state's authority to convict a person of that offense." *Smith*, 120 F.3d at 415.

The case at bar was not simply a case of instructional error. Here, by allowing Bradley to admit to the jury every element of the crime without providing a means of explaining or justifying his conduct, the trial court's actions not only *shifted* the burden of proof to the prosecution, they effectively *relieved* the prosecution of its burden of proof. The Ninth Circuit's finding of a due process violation is perfectly in keeping with decisional law of the Third Circuit. See *Smith v. Horn*, 120 F.3d at 415.[8]

2. Nor do the other Circuits' cases cited by petitioner represent conflicts requiring this Court's intervention. Pet. at 14. In *Wood v. Marshall*, 790 F.2d 548, 551-552 (6th Cir. 1986), the court held that because the burden of proof of the affirmative defense of insanity constitutionally may be placed on a criminal defendant, an oral jury instruction placing the burden on the defendant -- even if erroneous under

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8. Nor does the holding in *Ellis v. Hargett*, 302 F.3d 1182, 1188-1189 (10th Cir. 2002), also cited by petitioner, pet. at 13-14, conflict with *Bradley*. *Ellis* simply ruled that the defendant had not exhausted his federal due process claim in the state case, the state had not waived the exhaustion requirement, and the defendant raised only claims of state law violations.

state law -- did not violate the defendant's federal constitutional rights. This does not conflict with the Sixth Circuit's opinion in *Taylor v. Withrow*, *supra*, 288 F.3d 846, which held that the right to assert self-defense is a fundamental right and that failure to instruct on self-defense, when warranted by the evidence, violates a criminal defendant's rights under the due process clause, *id.* at 851, a question distinct from upon whom the appropriate burden of proof of that defense should lie. In both *Clemmons v. Delo*, *supra*, 177 F.3d at 685 and *Baker v. Leapley*, 965 F.2d 657, 659 (8th Cir. 1992), the Eighth Circuit, reaffirming that under *McGuire* and *Naughten* federal habeas corpus relief is not available for state law instructional error unless the instructions so infected the entire trial as to deprive the defendant of a fair trial, found insufficient defects in either defendant's trial to warrant relief under this standard. And *Tyson v. Trigg*, 50 F.3d 436, 447-448 (7th Cir. 1995), simply reasserted that a criminal defendant has a constitutional right to present witnesses in support of his defense, and that right would be empty without the right to instruction which allowed the jury to consider that defense, providing sufficient evidence existed to create a reasonable doubt of guilt in the mind of a reasonable juror.

Far from establishing conflicting appellate authority, the cases cited by petitioner suggest uniformity in this area. As the Sixth Circuit observed in *Taylor v. Withrow*,

> In finding that the right to claim self-defense is a fundamental right we break no new ground. Other Courts of Appeals have already reached the same conclusion. In a recent case Judge Easterbrook held that "[w]hen there is evidentiary support for a defendant's theory on self-defense, failure to instruct on self-defense violates a criminal defendant's Fifth and Sixth Amendment rights," *Sloan v. Gramley*, 215 F.3d 1330, 2000 WL 536164, at *3 (7th Cir. May 1, 2000), and Judge

> Richard Arnold also recently found that a criminal defendant "is entitled to a self-defense instruction if there is evidence to support his theory," *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999). This Court has also already held, as have other Courts of Appeal, that in certain circumstances refusal to instruct a jury properly on self-defense can so taint the resulting verdict as to be an error of constitutional dimension. *See, e.g., Davis v. Strack*, 270 F.3d 111, 116 (2d Cir.2001); *Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999), *cert. denied sub nom, Yukins v. Barker*, 530 U.S. 1229, 120 S.Ct. 2658, 147 L.Ed.2d 273 (2000).

Id., 288 F.3d at 852.

Indeed, the Second Circuit's holding in *Davis v. Strack*, *supra*, provides a perfect model for the case at bar. In *Davis*, the defendant admitted shooting the victim, but claimed it was justified due to past physical and sexual assaults perpetrated by the victim on the defendant. The trial court refused to instruct on the defense of justification. The Second Circuit acknowledged that under *Naughten* and *McGuire*, the question was not whether the court gave a faulty instruction, but whether the error so infected the entire trial that the resulting conviction violated due process. *Davis*, 270 F.3d at 123. The Court of Appeals held that because the defendant confessed to the killing, the trial court's ruling excluding instruction on the defense of justification -- warranted under New York state law -- completely deprived the defendant of a defense: without instruction on the defense, "the question whether he was guilty ... was thus open and shut." *Id.* at 131. The court further noted, "The effects of the court's error were to deprive Davis entirely of his defense -- on which he had a significant possibility of prevailing -- and to insure his conviction. The effect of the error was catastrophic." *Id.* at 133.

As the Ninth Circuit recognized, the error in the case at bar was equally

catastrophic: " [T]he refusal to give an entrapment instruction at the second trial, in effect, sandbagged Bradley into testifying and virtually confessing guilt, even though no entrapment instruction was given " Pet., App. A at A12, fn. 4. Given both the inter- and intra-Circuit uniformity on this issue, certiorari is not warranted in this matter.

III.

The Court of Appeals' two incidental references to juror affidavits in discussing the prejudice aspect of the case at bar do not constitute a "holding" requiring correction by this Court, as several other decisions both by this Court and the Ninth Circuit squarely address this issue.

In concluding the trial court's error was prejudicial, the Ninth Circuit primarily relied on the disparity in outcomes between Bradley's two trials:

> *[W]e need only look at the at the differing results of the two trials* to find that the failure to so instruct had a substantial and injurious effect on the jury verdict. In the first trial, an instruction was given, and a mistrial was declared after three days of deliberation and two clarifications on the defense. In the second trial, the same evidence was presented, but the instruction was not given. A guilty verdict was the result.

Pet., App. A at A12, emphasis added.

The Court of Appeals also noted that in his state appeal, Bradley filed declarations from two jurors from the second trial, attesting they would not have convicted Bradley had they been instructed on entrapment. Pet., App. A at A12. The Court of Appeals also concluded the state appellate court erred, inter alia, by failing to consider the undisputed evidence that jurors in the second trial would not have

convicted Bradley if instructed on entrapment. Pet., App. A at A14.

These two casual references to the juror affidavits hardly qualify as the opinion's "holding," as characterized by petitioner.[9] The opinion itself makes clear the court would have reached the same conclusion based on the disparity between the two trials. The information contained in the challenged affidavits was just one of many factors considered by the court, but hardly the most important.

Again, petitioner's fear that these two references to juror affidavits will let loose a deluge of challenges on this ground, particularly in capital cases, pet. at 17, is grossly exaggerated. Both this Court and the Ninth Circuit, as well as other Circuits, repeatedly have addressed this issue directly and squarely, in cases where the decisions regarding the admissibility *vel non* of juror affidavits under Rule 606(b) of the Federal Rule of Evidence actually *can* be considered the holdings. See *Tanner v. United States*, 483 U.S. 107, 121-122 (1987); *McDowell v. Calderon*, 107 F.3d 1351, 1267-1368 (9th Cir. 1997), reversed on another ground, 130 F.3d 833 (9th Cir. 1997) (en banc); *United States v. Falsia*, 724 F.2d 1339, 1343 (9th Cir. 1983); *Hard v. Burlington Northern R.R. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989); *Abatino v. United States*, 750 F.2d 1442, 1446 (9th Cir. 1985); *United States v. Bagniol*, 665 F.2d 877, 884-885 (9th Cir. 1981); *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 366 (8th Cir. 1992); *United States v. Cappas*, 29 F.3d 1187, 1192 (7th Cir. 1994); *Silagy v. Peters*, 905 F.2d 1086, 1008-1009 (7th Cir. 1990); *Fulwood v. Lee*, 290 F.3d 663,

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9. It appears safe to say that had the court's incidental references to the affidavits constituted the egregious trespass portrayed by petitioner, Judge Graber would have addressed that fact in her dissent. Yet Judge Graber is silent on that point.

684 (4th Cir. 2002).

In light of the above cited cases, all of which directly addressed the admissibility of juror affidavits under Rule 606(b), there is no compelling reason for this court to review what clearly was an incidental and hardly dispositive reference to juror affidavits. The law on this point is clear, and requires no further clarification from this Court.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Dated: September 10, 2003

Respectfully submitted,

JEFFREY S. KROSS
Attorney for Respondent
GARY BRADLEY

Appendix A

THE COURT: YOU KNOW THAT, AND I KNOW, BUT THE LESS SAID TO THE JURY IN THIS REGARD IS OF VALUE, I THINK. SO THE SAME RULES APPLY. I DON'T SEE ANY PROBLEM WITH IT.

MR. WALMARK: I ALSO THOUGHT BECAUSE -- TO SAVE HIS VOICE, I WAS GOING TO BE DOING ALL THE READING EXCEPT --

MR. MULCAHY: I DON'T HAVE ANY PROBLEM WITH THAT.

MR. WALMARK: YEAH. I WAS GOING TO DO ALL THE READING OTHER THAN THE ANSWERS, WHICH, OBVIOUSLY, MS. HOUSEMAN WILL.

THE COURT: OKAY. SO WE ARE STARTING WITH 485 AND GOING UNTIL THE END OF HIS CROSS.

MR. WALMARK: NO. WE ARE GOING TO START AT 465.

THE COURT: NO. I MEANT MR. RUBIN. WHAT YOU WANT ME TO READ?

MR. WALMARK: YES, RIGHT.

MR. MULCAHY: YES, AND IF YOU CAN JUST STATE BEFORE YOU START THAT YOU ARE GOING TO DO THE READING OF THE QUESTIONS THAT I WOULD NORMALLY DO JUST BECAUSE OF MY VOICE, THAT'S FINE.

MR. WALMARK: SURE.

THE COURT: I AM GOING TO ALSO READ TO THE JURY, OR TELL THEM, ABOUT 2.12, UNAVAILABLE WITNESS -- WELL, THAT'S INTERESTING. I'LL JUST SAY THAT --

MR. MULCAHY: MR. BRADLEY IS NOT UNAVAILABLE. MR. BRADLEY MIGHT DECIDE TO EXERCISE HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY IN THIS TRIAL, AND IF MR. BRADLEY EXERCISES THAT RIGHT AS TO THIS TRIAL, THEN THE COURT'S CONFRONTED WITH GIVING THE INSTRUCTIONS 2.60 BECAUSE HE

DOES HAVE --

THE COURT: YEAH, BUT THEN ARE YOU OBJECTING TO THIS COMING IN AT ALL?

MR. MULCAHY: I'M OBJECTING TO IT. I WOULDN'T LIKE IT TO BE READ AT ALL, PERIOD.

THE COURT: WHAT'S THE LEGAL REASON WHY IT SHOULD NOT BE READ AT ALL?

MR. MULCAHY: BECAUSE IT INFRINGES UPON MR. BRADLEY'S CONSTITUTIONAL RIGHT TO DECIDE IN THIS CASE, AFTER THE PEOPLE ARE DONE WITH THEIR CASE, TO REST ON THEIR CASE AND TO NOT TESTIFY WHATSOEVER, AND I THINK HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT IN THIS PARTICULAR TRIAL, BASED UPON THE WAY THE FACTS COME OUT IN THIS PARTICULAR TRIAL, CANNOT BE IMPINGED BY THE PEOPLE TRYING TO READ HIS PRIOR TESTIMONY.

THE COURT: OKAY. WHAT ABOUT THAT?

MR. WALMARK: 1220, CLASSIC CASE, PRIOR STATEMENT BY THE DEFENDANT.

THE COURT: ALL RIGHT. OKAY. OVERRULED. ALL RIGHT. WE'LL BRING IN -- WHO IS GOING TO DO THE READING.

MR. WALMARK: REBECCA HOUSEMAN WILL BE MR. BRADLEY, AND I'LL DO THE QUESTIONS.

MR. MULCAHY: BUT WHAT IS THE COURT GOING TO DO WITH THE INSTRUCTION 2.20?

THE COURT: 2.12.

MR. MULCAHY: 2.12. I'M SORRY.

THE COURT: WELL, NOT HAVING GIVEN IT A LOT OF THOUGHT, THE INITIAL THING THAT I WOULD SAY TO THE JURY IS

Appendix B

YOUR HONOR.

THE COURT: ALL RIGHT. GO AHEAD.

MR. MULCAHY: 4.60, ENTRAPMENT WHEN IN DEFENSE, 4.61.5, PERMISSIBLE AND IMPERMISSIBLE CONDUCT, AND 4.61, OBJECTIVE -- ENTRAPMENT OBJECTIVE TEST AND GUIDANCE.

YOUR HONOR, IT WOULD INDICATE THAT BASED UPON THE FACT THAT MR. BRADLEY TOOK THE STAND, RELATED WHY HE DID WHAT HE DID UNDER THE CIRCUMSTANCES, FALLS RIGHT WITHIN THE OBJECTIVE TESTS. THESE INSTRUCTIONS WERE ALSO GIVEN IN THE FIRST TRIAL. THESE ARE THE INSTRUCTIONS THAT I'M REQUESTING.

THIS SITUATION IS UNIQUE AND DIFFERENT THAN MOST SITUATIONS BECAUSE OF THE MANIPULATION THE POLICE DID OF MR. FLORES, AND THERE ARE FACTORS TO SUPPORT THAT. THEY HAVE CREATED A SITUATION WHERE SYMPATHY FOR AN INDIVIDUAL, I THINK THIS IS -- I HAVE ESTABLISHED SUFFICIENT EVIDENCE BY A PREPONDERANCE FOR THE JURY TO DETERMINE WHETHER THIS DEFENSE -- WHETHER OR NOT IT'S A DEFENSE, AND I WOULD ASK THE COURT TO GIVE THOSE INSTRUCTIONS.

THE COURT: ALL RIGHT. PEOPLE ON ENTRAPMENT.

MR. WALMARK: I WOULD ALSO RESPECTFULLY DISAGREE WITH THAT. I WOULD LIKE TO SEE ONE CASE THAT EVEN COMES CLOSE TO DESIGNATED FACT THAT THIS IS AN ENTRAPMENT.

THE COURT: ALL RIGHT. DENIED. IT WON'T BE GIVEN. WE'LL THINK ABOUT THIS OTHER LESSER, AND WE'LL TAKE A BREAK.

(RECESS TAKEN.)

THE COURT: ALL RIGHT. CONTINUING DISCUSSION ON

No. 03-249

IN THE SUPREME COURT OF THE UNITED STATES

W. A. DUNCAN, WARDEN, *Petitioner*,

v.

GARY BRADLEY, *Respondent*.

PROOF OF SERVICE UNDER RULE 29.5(b)

I, Jeffrey S. Kross, declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years and not a party to the within action. My business address is P.O. Box 16224, Oakland, California 94610-6224. On this date I served three copies of the enclosed RESPONDENT'S BRIEF IN OPPOSITION in said action by placing them in the United States mail at Oakland, California, addressed as follows:

Donald E. DeNicola
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013
(213) 897-2388

Counsel of Record for Petitioner, W. A. Duncan, Warden

I thereby have served all parties required to be served.

Executed this 11th day of September 2003 at Oakland, California.

